

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2014

2121048

Arthur Barney

v.

Elizabeth Bell, as personal representative of the estate of
Maurice Bell, deceased, and William Clay Teague

Appeal from Montgomery Circuit Court
(CV-12-901472)

MOORE, Judge.

Arthur Barney appeals from a summary judgment entered by the Montgomery Circuit Court ("the trial court") in favor of Elizabeth Bell, as personal representative of the estate of

2121048

Maurice Bell, deceased, and William Clay Teague on Barney's legal-malpractice claim.

Background

The record establishes the following pertinent facts. On July 15, 2010, Barney was injured in an automobile accident arising out of and in the course of his employment with the Lowndes County Commission ("the employer"). Barney retained Maurice Bell and William Clay Teague to represent him in regard to both a claim against the employer for workers' compensation benefits¹ and a claim against the third party allegedly responsible for the automobile accident. In connection with the third-party action, Barney agreed to a 50% contingency-fee arrangement.

Barney entered into a compromise settlement of his workers' compensation claim with Meadowbrook Insurance Group ("Meadowbrook"), the third-party claims administrator responsible for handling the employer's workers' compensation insurance claims. In that settlement, Meadowbrook agreed to

¹Barney originally retained a different attorney to represent him in connection with the workers' compensation claim. That attorney died during the pendency of that action, and Barney then retained Bell and Teague to represent him in that action.

2121048

pay, among other things, a lump-sum amount of \$42,500 to Barney. Pursuant to the terms of that settlement, Bell and Teague received 15% of the lump-sum amount, i.e., \$6,375, as their fee for handling the workers' compensation claim on behalf of Barney. Meadowbrook reserved its right to reimbursement in the amount of \$65,032.09 from any recovery obtained in Barney's third-party action. The trial court approved the terms of that settlement, including the 15% attorney-fee award, on May 20, 2011.

In January 2012, State Farm Mutual Automobile Insurance Company, the insurer for the third party involved in the automobile accident with Barney, agreed to pay a lump sum of \$45,000 to settle Barney's third-party action. It is undisputed that, on January 9, 2012, Bell and Teague retained 50% of the \$45,000, i.e., \$22,500, and that they forwarded the remaining \$22,500 to Meadowbrook in satisfaction of Meadowbrook's right to reimbursement in the third-party action.

2121048

On November 2, 2012, Barney filed a complaint against Bell² and Teague alleging legal malpractice pursuant to the Alabama Legal Services Liability Act, Ala. Code 1975, § 6-5-570 et seq. Barney alleged that Bell and Teague had failed to inform Barney that he was owed additional funds, that Bell and Teague had retained for their own benefit funds to which Barney was entitled, and that Bell and Teague had charged Barney excessive attorney's fees. More specifically, Barney asserted that Meadowbrook had agreed to reduce its subrogation interest in the third-party action to \$22,500 and that, therefore, Bell and Teague were entitled to only \$11,250 pursuant to their 50% contingency-fee agreement. Barney also asserted that, even if Meadowbrook had not agreed to reduce its subrogation interest in the third-party action, Bell and Teague were not entitled to retain the \$6,375 that had been awarded to them as attorney's fees in the workers' compensation settlement.

²After Barney initiated this legal-malpractice action against Bell and Teague, but during the pendency of this action, Bell died. Elizabeth Bell was substituted as Bell's personal representative.

Bell and Teague moved for a summary judgment, attaching an affidavit from Kathy McClamroch, the claims adjuster for Meadowbrook who had handled Barney's claim. The trial court denied that motion. Thereafter, the parties deposed McClamroch, who testified that Meadowbrook had agreed to accept \$22,500 of the \$45,000 third-party recovery in satisfaction of its statutory credit and subrogation rights, taking into account that Barney had agreed to pay Bell and Teague a 50% attorney's fee. McClamroch testified that Meadowbrook had maintained its rights to the entire third-party recovery, but she acknowledged that, based on the contingency-fee arrangement, Bell and Teague were owed 50% of the \$45,000 recovery as attorney's fees, thus entitling it to only \$22,500. Teague also testified in his deposition that he had made an oral agreement with McClamroch to pay Meadowbrook \$22,500 to satisfy its claim to the third-party recovery.

On June 27, 2013, Barney filed a motion for a partial summary judgment "as to liability and partial damages." In support of that motion, Barney attached requests for admissions he had sent to Teague on May 20, 2013, but to which Teague had not yet responded. In those requests for

2121048

admissions, Barney asked Teague to admit that Meadowbrook had agreed to accept the sum of \$22,500 "in full and final settlement of its workers' compensation subrogation interest" and that Teague had remitted \$22,5000 to Meadowbrook in accordance with that agreement. Barney also attached excerpts from the depositions of McClamroch and Teague relating to the settlement of Meadowbrook's claim against the third-party recovery and an affidavit from attorney Thomas Slate McDorman.

Bell and Teague subsequently filed a second motion for a summary judgment. In support of that motion and in opposition to Barney's motion for a partial summary judgment, Bell and Teague submitted additional excerpts from McClamroch's deposition. Barney moved to strike the excerpts from McClamroch's deposition that Bell and Teague had submitted in support of their motion and in opposition to his motion. The trial court denied that motion on July 16, 2013. Two days later, Barney filed his opposition to Bell and Teague's second summary-judgment motion and again moved to strike the excerpts from McClamroch's deposition submitted in support of Bell and Teague's second summary-judgment motion and in opposition to his partial-summary-judgment motion. On July 19, 2013, the

2121048

trial court denied Barney's second motion to strike. The trial court also granted Bell and Teague's summary-judgment motion, stating that the dispositive issue was whether Meadowbrook had agreed to reduce its subrogation interest. The trial court stated that the evidence before it unequivocally established that Meadowbrook had not agreed to reduce its subrogation interest, and, therefore, it entered a summary judgment in favor of Bell and Teague. Barney timely filed his notice of appeal.

Standard of Review

"Our standard of review for a summary judgment is as follows:

"'We review the trial court's grant or denial of a summary-judgment motion de novo, and we use the same standard used by the trial court to determine whether the evidence presented to the trial court presents a genuine issue of material fact. Bockman v. WCH, L.L.C., 943 So. 2d 789 (Ala. 2006). Once the summary-judgment movant shows there is no genuine issue of material fact, the nonmovant must then present substantial evidence creating a genuine issue of material fact. Id. "We review the evidence in a light most favorable to the nonmovant." 943 So. 2d at 795. We review questions of law de novo. Davis v. Hanson Aggregates Southeast, Inc., 952 So. 2d 330 (Ala. 2006).'"

Lloyd Noland Found., Inc. v. HealthSouth Corp., 979 So. 2d 784, 793 (Ala. 2007) (quoting Smith v. State Farm Mut. Auto. Ins. Co., 952 So. 2d 342, 346 (Ala. 2006)).

Analysis

Barney initially argues that the trial court erred in granting Bell and Teague's motion for a summary judgment as to his claim that they had retained excessive attorney's fees in relation to the third-party recovery. Barney argues that the trial court should have granted his motion to strike the excerpts from McClamroch's deposition and should have determined that Meadowbrook had agreed to accept \$22,500 in accord and satisfaction of its claim against the third-party recovery, thus entitling Bell and Teague to only \$11,250 in attorney's fees.

In support of his motions to strike, Barney noted that he had filed certain requests for admissions to Teague to which Teague had failed to timely respond.³ Those requests essentially asked Teague to admit that Meadowbrook had agreed

³According to his initial motion to strike, Barney had served Teague with the requests for admissions 38 days earlier. Rule 36, Ala. R. Civ. P., ordinarily gives a party 30 days to respond to requests for admission.

2121048

to accept \$22,500 in full satisfaction of its claim against the third-party recovery and that Teague had sent Meadowbrook a check in the amount of \$22,500 in accordance with that agreement. Under Rule 36(a), Ala. R. Civ. P., a matter subject to a request for admission generally is deemed admitted if no timely response is made. Barney argues that the trial court should have struck the excerpts from McClamroch's deposition submitted by Bell and Teague in support of their summary-judgment motion and in opposition to his partial-summary-judgment motion, because, he says, those excerpts contradicted Teague's deemed admission that Meadowbrook had reduced its claim against the third-party recovery.

Assuming that the trial court determined that Teague had admitted the matters set forth in the requests for admissions, see Bradley v. Demos, 599 So. 2d 1148 (Ala. 1992); Green Tree Acceptance, Inc. v. Doan, 529 So. 2d 201 (Ala. 1988); and Hatton v. Chem-Haulers, Inc., 393 So. 2d 950 (Ala. 1981) (all holding that any relief to be afforded from the consequences of tardy responses to requests for admissions lies within the trial court's discretion), we find no error in the trial

2121048

court's decision to deny the motions to strike. In her deposition, McClamroch did not contradict Teague's deemed admissions. She confirmed that Meadowbrook had accepted \$22,500 in satisfaction of its claim to the third-party recovery. McClamroch further explained that Meadowbrook had accepted that amount by taking into account its right to a full recovery of the \$45,000 third-party recovery, less the 50% contingency fee to which Barney had agreed. Thus, the application of Rule 36 did not require the trial court to strike the deposition excerpts submitted by Bell and Teague.

Barney next argues that the undisputed evidence shows that Meadowbrook agreed to reduce its claim to the third-party recovery to \$22,500. To reach that conclusion, however, Barney relies on only Teague's allegedly deemed admissions and portions of McClamroch's deposition. As previously discussed, those materials do not support Barney's assertion. Although McClamroch acknowledged that Meadowbrook had accepted \$22,500 as a full settlement of its subrogation interest in the third-party action, she also testified: "[W]e didn't per se reduce our subrogation. It was just, you know, after taking [their] fee, after keeping that in mind, you know, 50 percent of 45 is

2121048

22,500; right?" Reading McClamroch's testimony in context reveals that Meadowbrook did not agree to reduce its subrogation interest in the third-party action but, rather, agreed to pay the proportionate share of attorney's fees on the full \$45,000 recovery, thereby netting a recovery of \$22,500 on its claim. See McGough v. G & A, Inc., 999 So. 2d 898, 905-06 (Ala. Civ. App. 2007) ("When reviewing an excerpt of deposition testimony to determine whether it creates a genuine issue of material fact, this court does not consider it abstractly, independently, and separately from the balance of the deposition testimony. ... Rather, this court must consider the context of the testimony as well as the remainder of the deposition testimony in order to determine if the testimony as a whole creates a reasonable inference to support the proponent's position."). Thus, the trial court did not err in finding that Meadowbrook had not agreed to reduce its claim to the third-party recovery by accepting \$22,500 as an accord and satisfaction. See Ex parte Meztista, 845 So. 2d 795, 797 (Ala. 2001) (quoting Leisure American Resorts v. Carbine Constr. Co., 577 So. 2d 409, 411 (Ala. 1990)) ("An accord and satisfaction is an agreement reached between

2121048

competent parties regarding payment of a debt the amount of which is in dispute.'").

Based on the foregoing evidence, Bell and Teague were entitled to a summary judgment as to Barney's claim that they had retained excessive attorney's fees from the third-party recovery. Section 25-5-11(e), Ala. Code 1975, a part of the Alabama Workers' Compensation Act, § 25-5-1 et seq., Ala. Code 1975, provides, in pertinent part:

"In a settlement made under this section with a third party by the employee or, in case of death, by his or her dependents, the employer shall be liable for that part of the attorney's fees incurred in the settlement with the third party, with or without a civil action, in the same proportion that the amount of the reduction in the employer's liability to pay compensation bears to the total recovery had from the third party."

In Fitch v. Insurance Co. of North America, 408 So. 2d 1017, 1019 (Ala. Civ. App. 1981), this court construed § 25-5-11(e) to require employers to pay attorney's fees in accordance with the following formula:

$$\frac{\text{Employer's Reduced Liability}}{\text{Third Party Recovery}} = \frac{\text{X}}{\text{Attorney Fees \& Expenses}}$$

Applying that formula to the present case, because the receipt of the entire proceeds of the third-party settlement reduced

2121048

Meadowbrook's liability by \$45,000, it was required to pay Bell and Teague attorney's fees of \$22,500 based on the 50% contingency-fee agreement they had made with Barney. Hence, Bell and Teague did not commit malpractice by retaining the \$22,500 fee, and they were entitled to judgment as a matter of law in their favor on that claim.

Once they received the \$22,500 fee from the third-party recovery, however, Bell and Teague no longer had the right to retain the attorney's fees collected from prosecuting the workers' compensation claim. Section 25-5-90, Ala. Code 1975, provides that an attorney may receive a maximum of 15% of the compensation "awarded or paid." In Bynum v. City of Huntsville, 779 So. 2d 243 (Ala. Civ. App. 1999), this court construed that language as requiring a circuit court to credit the proceeds of a third-party recovery against the workers' compensation benefits awarded before assessing attorney's fees; otherwise, an employee would end up paying exorbitant attorney's fees, and an attorney who prosecutes both the workers' compensation claim and the third-party claim would receive double compensation. Based on that reasoning, Bell and Teague would not be entitled to any attorney's fees on the

workers' compensation claim because the amount recovered from the third party, \$45,000, exceeded the amount of the workers' compensation settlement, \$42,500, and the \$22,500 in attorney's fees received from the settlement of the third-party action fully compensates them for their services.

In Bynum, the third-party recovery preceded the workers' compensation settlement, so the circuit court was able to calculate the third-party-credit amount when determining the proper amount of attorney's fees to be awarded.⁴ In this case, the third-party settlement occurred over six months after the trial court approved the workers' compensation settlement. Hence, the trial court could not have applied the credit at the time it approved the workers' compensation settlement, and it correctly calculated the attorney's fees at that time. It remains, however, that, when they obtained the third-party recovery, Bell and Teague could not legally retain a double fee under the holding in Bynum.

⁴In Bynum, the circuit court actually miscalculated the credit by reducing it by one-third to account for the attorney's fees paid by the employer on the third-party recovery. No one appealed that issue, however.

2121048

In support of his claim on this issue, Barney submitted an affidavit of Thomas Slate McDorman, a licensed attorney, who attested, in pertinent part:

"Pursuant to § 25-5-11(a), Code of Alabama (1975), and the holding in Bynum vs. City of Huntsville, 779 So. 2d 243 (Ala. Civ. App. 1999), [Bell and Teague] were not entitled to retain both the \$6,375.00 awarded as attorney's fees on the workers' compensation settlement and the 50% contingent fee totaling \$22,500 from the State Farm settlement. This constitutes a 'double fee' which is expressly forbidden. ... Bell and Teague were obligated to remit the \$6,375.00 awarded in the workers' compensation case as attorney fees to Barney upon finalization of the State Farm settlement. Their failure to do so breached the standard of care."

Bell and Teague did not offer any evidence to dispute that testimony. To the contrary, upon questioning by Barney's attorney, Teague testified in his deposition as follows:

"Q: Okay. And you're not aware that since you recovered \$22,500 on the State Farm matter that the workers' comp[ensation] attorney fee award has to be vacated? You're not aware of that?

"A: Well, I believe through your motions to vacate, yes, I found that out, but that would mean that Mr. Barney would have to give back his money as well.

"Q: Okay. Let me ask you another question. You talk about my filing. You're talking about the rule 60 motion that was filed in the workers' comp[ensation] case?

2121048

A: I believe so, yes.

Q: And that's where you first heard that suggestion?

A: Yes.

Q: Did you go and look into it to determine if it was an accurate assertion or not?

"A: No.

"Q: So you understood the assertion in that filing to be that you cannot keep the attorney fee in the workers' comp[ensation] case[,] correct? Is that the way you understood it?

"A: Yes, that's the assertion.

"Q: And after you read that is it your testimony you did nothing to determine whether it's proper for you to keep those funds or not?

"A: No, I did not. I did not.

"Q: And short of a court ordering you to return that money, you have no intention of returning it, do you?

"A: No, sir.

"Q: And I take it you have no intention of going to look into the issue of whether you should return that money to him[,] is that correct? Because I would assume if you intended to look into it, you would have already done it[,] right?

"A: Yeah."

In Ex parte Free, 910 So. 2d 753 (Ala. 2005), our supreme court recognized that a former client had stated a cognizable claim of legal malpractice against her former lawyer under the Alabama Legal Services Liability Act based on the lawyer's alleged acts, which included withholding information and charging excessive attorney's fees in representing the client in connection with her workers' compensation claim, despite the lawyer's assertion that the fees had been approved by the court and were not illegal. In this case, Barney has presented undisputed evidence indicating that Bell and Teague retained a double fee in violation of Bynum and that, in doing so, they committed legal malpractice. Thus, we agree with Barney that the trial court erred in entering a summary judgment in favor of Bell and Teague on his claim asserting that they had breached the applicable standard of care owed to Barney by failing to inform him that he was entitled to a rebate of the \$6,375 attorney's fees they had received in the workers' compensation settlement and by retaining those funds for their own benefit. Based on the record before it, the trial court should have granted Barney's motion for a partial

2121048

summary judgment "as to liability and partial damages" in regard to that claim.⁵

We, therefore, affirm that part of the judgment granting Bell and Teague's summary-judgment motion as to Barney's claim that they retained excessive fees from the third-party recovery. We reverse that part of the judgment granting Bell and Teague's summary-judgment motion as to Barney's claim that they failed to inform Barney of his right to a refund of the attorney's fees collected in the workers' compensation action and that they unlawfully retained that fee for their own benefit, and we remand the cause with instructions to the trial court to enter a judgment awarding Barney \$6,375 in compensatory damages, representing the amount Bell and Teague should have remitted to him upon recovery of their fees in the third-party action. The trial court is also instructed to

⁵An "appeal from a pretrial final judgment disposing of all claims in the case ... entitles [the appellant], for purposes of our review, to raise issues based upon the trial court's adverse rulings, including the denial of [the appellant's] summary-judgment motions." Lloyd Noland Found., Inc. v. City of Fairfield Healthcare Auth., 837 So. 2d 253, 263 (Ala. 2002). See also Downing v. Halcyon Oaks Homeowners Ass'n, 96 So. 3d 818, 828 n.3 (Ala. Civ. App. 2012).

2121048

determine whether Barney is entitled to an award of punitive damages and, if so, to determine the amount of such award.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

Pittman, Thomas, and Donaldson, JJ., concur.

Thompson, P.J., recuses himself.